FILED
FEB 19 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

NO. 75-1177

In the Matter of the Adoption of NICOLE LEIGH HOFFMAN, a Minor Female Child

BERNARD ALLEN HOFFMAN, SUSAN ANN HOFFMAN, and NICHOLE LEIGH HOFFMAN, Petitioners,

vs.

ROSE ALLEN HOFFMAN and ROBERT NICHOLAS HOFFMAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

SAMUELS, MILLER, SCHROEDER,
JACKSON & SLY
406 Citizens Building
Decatur, Illinois 62525
Telephone: (217) 429-4325
Attorneys for Petitioners

JERALD E. JACKSON
WILLIAM O. MARTIN, JR.

Of Counsel

BLEED THROUGH

IN THE SUPREME COURT OF THE
UNITED STATES

NO. _____

In the Matter of the Adoption of NICOLE LEIGH HOFFMAN, a Minor Female Child

BERNARD ALLEN HOFFMAN, SUSAN ANN HOFFMAN, and NICHOLE LEIGH HOFFMAN, Petitioners,

vs.

ROSE ALLEN HOFFMAN and ROBERT NICHOLAS HOFFMAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Bernard Allen Hoffman and Susan Ann Hoffman, the natural parents, pray that a writ of certiorari issue to review the judgment entered in this case on September 26, 1975, by the Supreme Court of the State of Illinois. On November 21, 1975, the Illinois Supreme Court denied Petitioners' Petition for Rehearing.

INDEX

	Page
Opinion Below	3
Jurisdiction	3
Question Presented	3
Statutes Involved	4
Statement	5
Reasons for Granting the Writ	16
Summary	27
Conclusion	29
Appendix	30
Opinion of Appellate Court of Illinois, 4th District	33
Opinion of Illinois Supreme Court	53
Order of Illinois Supreme Court Denying Petition for Rehearing	69

TABLE OF CASES

(a) Argersinger v. Hamlin, 32 L. Ed. 2d 530 (1972)

(b) Powell v. Alabama, 77 L. Ed. 158 (1932)

(c) Stanley v. Illinois, 405 US 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)

TABLE OF TEXTBOOKS

(a) Corpus Juris Secundum, Vol. 43, Infants, §108

(b) American Jurisprudence, 2d, Vol. 42, Infants, §171

AUTHORITIES CITED

(a) U.S.C.A. Constitution Amendment V

(b) U.S.C.A. Constitution Amendment XIV, §1

(c) Illinois Revised Statutes 1971, Ch. 4, §9.1-13

OPINION BELOW

The opinion of the Illinois Appellate Court is reported at 24 Illinois Appellate 3d 543, 321 N.E. 2d 174 and can be found beginning on page 33 of this Petition.

The Opinion of the Illinois Supreme Court is reported at 338 N.E. 2d 862, and can be found beginning on page 53 of this Petition.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on September 26, 1975. On November 21, 1975, that court denied a Petition for Rehearing. The jurisdiction of this court is invoked under Section 2101(c) of the Judicial Code.

QUESTION PRESENTED

The sole question presented for review is whether constitutional rights of the natural parents were violated by their nonrepresentation of legal counsel

at the time their consents to adoption were taken, especially in light of the fact that the natural mother was a minor, and had no guardian ad litem appointed for her by the court.

STATUTES INVOLVED

The pertinent portions of the statute involved are set out in the Appendix.

STATEMENT

The minor child in question is Nicole Leigh Hoffman. The natural parents of the minor are Bernard Allen Hoffman and Susan Ann Hoffman, Petitioners. The paternal grandparents of the child and adoptive parents, Rose Allen Hoffman and Robert Nicholas Hoffman, were the original petitioners for adoption.

On December 5, 1969, the natural parents, Bernard Allen Hoffman and Susan Ann Hoffman, were married. Bernard was 19 and Susan 16 at the time.

On June 13, 1970, Bernard and Susan had a daughter born to them, whom they named Nicole Leigh. Between December 5, 1969, and June 13, 1970, Susan Ann Hoffman resided at her parents' home. However, she had frequent contacts with Rose Allen Hoffman, as Rose Hoffman would come by, almost nightly, to take Susan for a walk.

After the baby was born, Susan moved in with her in-laws, Robert and Rose Hoffman, Nicole's paternal grandparents, where she began to perform the functions and duties expected of all new mothers. She was joined by her husband, Bernard Allen Hoffman, in late September, 1970, when he was honorably discharged from the United States Navy. In the fall of 1971 Susan Hoffman returned to high school in order to get her diploma, but this had no great effect on the motherly duties she was performing with regard to her daughter. During all this time in question, both Bernard and Susan continued to reside with Robert and Rose Hoffman.

Understandably so, this period in the lives of Bernard and Susan was one of adjustment and stress. They did experience some marital discord, and at one time Bernard contemplated a divorce from Susan.

POOR COPY

It was sometime in May or June of 1971 when the question of adopting Nicole was first presented to Bernard and Susan by Robert and Rose Hoffman. The minor's grandparents argued that some arrangements should be made in order to provide for Nicole in the event that Bernard and Susan should perish in a common accident. Later, when Bernard contemplated divorce, Bernard's mother suggested to Bernard that he and Susan execute a consent to adoption in order to assure that, in event of a divorce, Nicole would remain on the Hoffman side of the family. This plan was rejected, but the grandparents persisted by arguing that such a provision would be in the best interest of Nicole. The grandparents denied that such occurred.

The idea of adoption was at first rejected by the natural parents. However, the grandparents continually represented

POOR COPY

to Bernard and Susan "that the adoption was only for the purpose of providing a home for Nicole in case something should happen to Bernard and Susan, that Bernard and Susan would always have physical custody of the child," and that "if you really love your child you'll want to do the right thing." When Bernard and Susan inquired as to whether there existed another method by which the same results could be obtained, they were told by Rose Hoffman that she would check with an attorney; later she stated to Bernard and Susan that an adoption was the only method by which the child could be provided for in the event of their death. The grandparents denied that any such representation was made.

The grandparents acquired local counsel to handle the adoption for them. The grandparents set up a meeting between

BLEED THROUGH POOR COPY

Bernard and Susan and the grandparents' counsel for the purpose of Bernard and Susan signing the consents to adoption. On July 1, 1971, this meeting occurred, with the grandparents' attorney briefly describing the adoption procedure and the consequences of their action. After meeting for approximately ten minutes, the grandparents' counsel and Bernard and Susan proceeded to the chambers of Judge William C. Calvin, where another meeting of ten minutes occurred. Although Bernard and Susan were warned as to the finality of their actions if they signed the consents, AT NO TIME WERE THEY TOLD, EITHER BY THE GRANDPARENTS' COUNSEL OR THE TRIAL JUDGE THAT AN ADOPTION WAS NOT THE ORTHODOX MEANS OF PROVIDING FOR A CHILD IN THE EVENT OF A COMMON ACCIDENT TO THE NATURAL PARENTS, BUT THAT THIS RESULT WAS NORMALLY ACHIEVED THROUGH THE APPOINTMENT OF A

TESTAMENTARY GUARDIAN IN A WILL. Bernard and Susan were convinced that an adoption was the only way to provide for the child, and that is the only reason they signed the consents.

IT IS ALSO VERY IMPORTANT TO POINT OUT THAT AT NO TIME WERE BERNARD AND/OR SUSAN EVER REPRESENTED BY COUNSEL OF CHOICE NOR A GUARDIAN AD LITEM, TOLD OF THEIR RIGHT TO BE REPRESENTED BY COUNSEL, NOR WERE THEY ADVISED TO SEEK PROFESSIONAL HELP. AT THE TIME THE CONSENTS WERE TAKEN, SUSAN, THE NATURAL MOTHER, WAS A MINOR, AGE 17.

The adoption decree was entered on July 30, 1971. For approximately fourteen months after the adoption, Bernard and Susan continued to reside with the grandparents as if nothing had occurred that would have affected their parental relationship with their daughter. During this fourteen months there were never any

BLEED THROUGH POOR COPY

actions on behalf of the minor's grandparents that the child was now theirs, and in fact all proceeded the way that Bernard and Susan had been told it would.

In late September of 1972, Bernard and Susan bought a trailer and proceeded to move their belongings from the grandparents' residence. It was their belief that naturally their daughter should accompany them. It was then that the natural parents learned that the grandparents, Robert and Rose Hoffman, would not let Nicole leave.

On July 23, 1973, Bernard and Susan filed a petition supported by affidavits, under Section 72 of the Illinois Civil Practice Act (Chapter 110), requesting that the decree of adoption be set aside. In Count I, the petition alleged fraudulent conduct on behalf of the grandparents in their representations made by Rose Hoffman,

BLEED THROUGH POOR COPY

the adoptive mother, as to why Bernard and Susan should execute a consent to the adoption of Nicole were false, and that these representations were relied upon by the natural parents. In Count II the petition alleged that the consents to adoption were voidable as they were obtained without presence of counsel and were, therefore, obtained contrary to the due process and equal protection clauses of the Constitution of the United States of America and §9.1-13 of Chapter 4 of the Illinois Revised Statutes, known as the Adoption Act.

On October 2, 1973, a hearing was held on the petition to vacate the decree. On October 11, 1973, the Court denied relief as prayed for by the natural parents, with the Court's only remarks being that the natural parents failed to sustain their burden of proof.

POOR COPY

The natural parents appealed, and on December 17, 1974, the Appellate Court of Illinois, Fourth District, reversed the trial court and the cause remanded with directions to grant the petition to vacate the decree (24 Ill. App. 3d 543, 321 N.E. 2d 174). The basis of the Appellate Court's opinion was that the minor's grandmother became inordinately attached to Nicole and functioned as a surrogate mother in all respects. Furthermore, the grandparents, in violation of their fiduciary responsibility, exploited the parents' ignorance and used this ignorance to sever Nicole from them. The Appellate Court found that the cumulative effect of the entire course of events and the manner that the grandparents capitalized thereupon amounted to fraud which was perpetrated upon the parents and the infant.

BLEED THROUGH POOR COPY

On March 21, 1975, the Illinois Supreme Court allowed the grandparents' petition for leave to appeal. On September 26, 1975, the Supreme Court reversed the Appellate Court and affirmed the Circuit Court judgment. (338 N.E. 2d 862) The reasoning of the Supreme Court was that the credibility of the witnesses was of major importance and is best determined by the trier of fact, and therefore the Circuit Court's decision was not against the manifest weight of the evidence. On November 21, 1975, the Supreme Court denied the natural parents' Petition for Rehearing.

The Appellate Court never discussed the issue presented to this court. The Illinois Supreme Court was not persuaded that there is merit to this contention. While it felt it may be desirable for the natural parents of a child to have

BLEED THROUGH POOR COPY

legal counsel prior to consenting to the adoption of the child, they do not find it to be constitutionally required since in Illinois all adoption consents are to be acknowledged by a parent before a judge or other person designated or approved by the court.

* * *

The sole question presented for review is whether constitutional rights of the natural parents were violated by their non-representation of legal counsel at the time their consents to adoption were taken, especially in light of the fact that the natural mother was a minor, and had no guardian ad litem appointed for her by the court.

POOR COPY

REASONS FOR GRANTING THE WRIT

Beginning with Powell v. Alabama, 77 L. Ed. 158 (1932) and running to Argersinger v. Hamlin, 32 L. Ed. 2d 530 (1972), the Supreme Court of the United States has held that it is a violation of due process and equal protection for a layman to be tried for a felony or misdemeanor, respectively, without the advice of counsel. These decisions are relative to state action through the Fourteenth Amendment.

We do not quote Powell or Argersinger as direct authority for the point that the natural parents were deprived of their constitutional rights because of lack of counsel when they signed their consents. However, there is relative language in both cases:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to

> be heard of counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.
>
> Powell v. Alabama, 77 L. Ed 158, 170 (1932)
>
> Argersinger v. Hamlin, 32 L. Ed 2d 530, 535 (1972)
>
> The Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at all for drawing this distinction. The logic it advances for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed. Nor does the majority deny that some "non-jail" penalties are more serious than brief jail sentences.
>
> Argersinger v. Hamlin, 32 L. Ed. 2d 530, 547 (1972)

Granted, Powell and Argersinger are cases concerning imprisonment. Yet are the laws concerning criminal conduct any less

BLEED THROUGH POOR COPY

difficult for the layman to understand than the laws of adoption? In Argersinger the penalty was only a short jail sentence; in this case the "penalty" is the loss of a natural child.

Even though the natural parents were before a judge when the consents were signed, they had "no skill in the science of law." Only if they had been represented by counsel could their rights have been fully protected.

Under existing law, there is an artificial distinction which provides people with an attorney whenever they face the possibility of imprisonment, yet no provisions are made for those situations where the person may lose a lot more than his time spent in jail. Who could deny that the loss of a natural child is far more harsh and severe than a 30-day stint in the county jail. The Supreme Court has in the

BLEED THROUGH POOR COPY

past recognized the importance of this right. In Stanley v. Illinois, 31 L. Ed 2d 551 (1972) (405 US 645, 92 S. Ct. 1208), at page 558, the court stated:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 US 390, 399, 67 L Ed 1042, 1045, 43 S Ct 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v Oklahoma, 316 US 535, 541, 86 L Ed 1655, 1660, 62 S Ct 1110 (1942), and "[r]ights far more precious . . . than property rights," May v Anderson, 345 US 528, 533, 97 L Ed 1221, 1226, 73 S Ct 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v Massachusetts, 321 US 158, 166, 88 L Ed 645, 652, 64 S Ct 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v Nebraska, supra, at 399, 67 L Ed at 1045, the Equal Protection Clause of the Fourteenth Amendment, Skinner v Oklahoma, supra, at 541, 86 L Ed at 1660, and the Ninth Amendment, Griswold v Connecticut, 381 US 479, 496, 14 L Ed 2d 510, 522, 85 S Ct 1678 (1965) (Goldberg, J., concurring). (Emphasis added)

POOR COPY

Yet under the due process and equal protection clauses, the criminal suspect is afforded the advantages of counsel while the natural parent is not. This distinction is false and unreasonable, and the protection of representation by counsel should extend to the natural parents who are contemplating giving up their child for adoption.

The U. S. Supreme Court has recognized this distinction in the Argersinger case. In Justice Powell's concurring opinion, on page 547, he states:

> The Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constituional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at all for drawing this distinction. The logic it advances for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be

POOR COPY

> imposed. Nor does the majority deny that some "non-jail" penalties are more serious than brief jail sentences.

Not only is Justice Powell recognizing a distinction between "jail" and "non-jail" penalties, but he states unequivocably that the Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty may not be taken from a person without affording him due process of law.

Extending the right to counsel to the natural parents before taking their consents could only have a beneficial effect upon the law. Cases such as this would never be before the court as any misconceptions would be completely erased before the consents were signed. What little trouble it would be to appoint a guardian ad litem to explain the law to the natural parents.

THE MINOR MOTHER

The strong argument can be made on behalf of Susan, the natural mother, a

minor. Lack of counsel in a consent hearing is in violation of the equal protection clause of the Fourteenth Amendment. In any Illinois adoption proceeding the courts automatically appoint counsel to represent the minor to be adopted. Surely the same protection should extend to a natural parent when she too is a minor such as Susan was. There is no reasonable basis for distinguishing between the two types of people.

In Stanley v. Illinois, 405 US 645, 31 L. Ed 2d 551, 92 S. Ct. 1208, the Supreme Court applied the equal protection clause to an Illinois adoption case. There the court held that there was a denial of equal protection under the Fourteenth Amendment where, under Illinois law, in neglect proceedings, married parents were entitled to notice, a hearing, and proof of unfitness as to the parent, while an

unmarried parent was not.

There is a striking parallel in the present case. After consents are taken, under Illinois law, in any adoption proceeding the court is required to appoint a guardian ad litem for the child sought to be adopted. In existence at the time the consents were taken was Ill. Rev. Stat. 1971, Ch. 4, §9.1-13:

> B. In all cases:
>
> (a) The court shall appoint the State's Attorney of the county in which the proceeding is pending, or some other licensed attorney as guardian ad litem to represent a child sought to be adopted. Such guardian ad litem shall have power to consent to the adoption of the child, if such consent is required;
>
> (b) The court shall appoint a guardian ad litem for all other incompetent defendants, if any. (Emphasis added)

If there is a requirement that the minor child be represented by counsel, there is no rational basis for not appoint-

BLEED THROUGH POOR COPY

ing a guardian ad litem for the minor parent, and failure to do so is discriminatory and in violation of the Fourteenth Amendment.

The Illinois legislature has since recognized the evil and has amended subparagraph (b) of §9.1-13(b). That section now reads:

> (b) The court shall appoint a guardian ad litem for all named minors or incompetent defendants, if any. (Emphasis added)

Yet, it is still not clear whether this right to counsel exists at the time the consents are taken. Under the equal protection clause the minor parent should be afforded the same right to counsel that his or her child has.

The natural mother brings to the court's attention an Illinois statute which states that the consent of a parent who is a minor shall not be voidable because

of such minority (Ill. Rev. Stat. 1971, Ch. 4, §9.1-11). She does not attack the validity of that statute, but argues that before a minor can give a valid consent, he (or she) must be afforded the right to counsel, as previously discussed.

It could appear to one that the natural mother is trying to extend the right to counsel to civil cases--this is not the case! All the natural mother is really trying to do is to have the court apply, and perhaps somewhat extend, the existing law. It is a well settled principle that a judgment taken against a minor who has not had a guardian ad litem appointed for him is voidable at the minor's option. This principle is so well settled that I will not take the court's time with numerous cases or citations, but will refer to two encyclopedic sources. In Corpus Juris Secundum,

Volume 43, Infants, §108, on page 280, it states:

> ". . . where the court has otherwise jurisdiction, a judgment or decree rendered against an infant without the appointment of a guardian ad litem, . . . is . . . voidable. . . ."

And in American Jurisprudence, 2nd, Volume 42, Infants, §171, on page 158, it states:

> ". . . a judgment rendered against an infant defendant without such representation (of counsel) is . . . erroneous or voidable. . . ."

Should not the same rationale be applicable to a minor who has consented to the adoption of her child without benefit of advice of counsel?

SUMMARY

Two hundred years ago Thomas Paine, in his publication Common Sense, wrote of man's inalienable rights to life, liberty, and the pursuit of happiness. Yet there is a right so fundamental that it looms above those liberties that free people hold so dear. It is a right so fundamental that it is adhered to by every democracy and dictatorship on the earth. It is a right that is not unique to the society of man, but is even recognized by every member of the animal kingdom. It is the right of a parent to raise its offspring.

The case before the Court is the very example of why a natural parent, especially a minor, should be afforded the right to counsel in order to protect this fundamental right. Granted, the natural parents briefly discussed this matter with the attorney representing the adoptive

BLEED THROUGH POOR COPY

parents. And granted, before taking the consents the judge admonished the parents as to the finality of their actions. But was this enough to protect their rights?

If counsel had been appointed, or if a guardian ad litem had been appointed for the minor mother, there would not have been, nor would there be, hasty interviews with the attorney representing the opposing party or with a judge who explains the legal consequences of the parents' actions, but cannot give legal advice a counseling. A parent's right in his or her child is too important a right to be terminated without advice of counsel.

POOR COPY

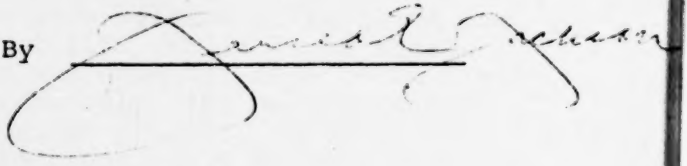
CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD ALLEN HOFFMAN and SUSAN ANN HOFFMAN, Petitioners

By SAMUELS, MILLER, SCHROEDER, JACKSON & SLY

By 

SAMUELS, MILLER, SCHROEDER,
JACKSON & SLY
406 Citizens Building
Decatur, Illinois - 62525
Telephone: (217)-429-4325
Attorneys for Petitioners

APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Revised Statutes
1971, Ch. 4, §9.1-13

INTERIM ORDER. As soon as practicable after the filing of a petition for adoption the court shall hold a hearing for the following purposes:

A. In other than an adoption of a related child or an adoption through an agency, or of an adult:

(a) To determine the validity of the consent, provided that the execution of a consent pursuant to this Act shall be prima facie evidence of its validity, and provided that the validity of a consent shall not be affected by the omission therefrom of the names of the petitioners or adopting parents at the time the consent is executed or acknowledged, and further provided that the execution of a consent prior to the filing of a petition for adoption shall not affect its validity;

(b) To determine whether there is available suitable temporary custodial care for a child sought to be adopted.

B. In all cases:

(a) The court shall appoint the State's Attorney of the county in which the proceeding is pending, or some other licensed attorney as guardian ad litem to represent a child sought to be adopted. Such

BLEED THROUGH POOR COPY

guardian ad litem shall have power to consent to the adoption of the child, if such consent is required;

(b) The court shall appoint a guardian ad litem for all other incompetent defendants, if any;

(c) If it is proved to the satisfaction of the court, after such investigation as the court deems necessary, that termination of parental rights and temporary commitment of the child to an agency or to a person deemed competent by the court including petitioners, will be for the welfare of the child, the court may order the child to be so committed and may terminate the parental rights of the parents and declare the child a ward of the court or, if it is not so proved, the court may enter such other order as it shall deem necessary and advisable. As amended by act approved July 31, 1967. L. 1967, p. 2273.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

Honorable Harold F. Trapp, Presiding Judge
Honorable James C. Craven, Judge
Honorable Samuel O. Smith, Judge

Attest: ROBERT L. CONN, Clerk

BE IT REMEMBERED, that to-wit: On the 17th day of December, A.D. 1974, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 12490 Agenda No. 74-198

IN THE MATTER OF THE ADOPTION OF NICHOLE LEIGH HOFFMAN, a minor female child, # # # # ROSE ALLEN HOFFMAN and ROBERT NICHOLAS HOFFMAN,	)	
Petitioners-Appellees,	)	Appeal from Circuit Court DeWitt County 71-L-92
v.	)	
BERNARD ALLEN HOFFMAN, SUSAN ANN HOFFMAN and NICOLE LEIGH HOFFMAN,	)	
Defendants-Petitioners-Appellants.	)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

Bernard and Susan Hoffman, petitioners, (herein parents) filed a motion under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 72) to vacate the decree of adoption of the

POOR COPY

circuit court of DeWitt County. The decree of adoption in question had been entered in favor of Robert and Rose Hoffman, respondents, the adopted child's paternal grandparents (herein grandparents). The circuit court denied the motion. The only stated basis for the court's ruling was that "Petitioners have failed to sustain their burden of proof." This appeal is from the judgment entered. The single issue here is whether the trial court's ruling was against the manifest weight of the evidence. We find that it was.

The facts giving rise to this appeal are as follows: The parents were married on December 5, 1969. At that time, Bernard was 19 and serving in the United States Navy; Susan was 16 and attending high school. Susan resided with her parents until approximately June 13, 1970, the date their daughter, Nicole

Leigh, was born. Thereafter, Susan moved in with her in-laws. Bernard joined Susan and the infant in September of 1970, after he was honorably discharged from the United States Navy.

This period in the lives of Bernard and Susan was one of adjustment and stress. They experienced a great deal of marital discord, and at one time Bernard contemplated a divorce from Susan. Then, sometime in May or June of 1971, the question of adopting Nicole was raised by the grandparents, an assertion contested by the latter. In any case, the record reflects that the matter was raised because parents or grandparents felt that some arrangements should be made in order to provide for Nicole in the event Bernard and Susan should die in a common disaster. Later on, when Bernard contemplated a divorce, Bernard's mother

allegedly suggested that Bernard and Susan execute a consent to adoption in order to assure that if Bernard and Susan did become divorced, Nicole would remain on the Hoffman side of the family. This plan was rejected. However, the grandparents persisted by arguing that such a provision would be in the best interest of Nicole. The parents inquired of grandparents if adoption was the only method by which a guardianship for Nicole could be effected, and the grandparents allegedly stated that it was. The grandparents denied that any such representation was made.

Grandparents retained counsel to accomplish the adoption of their granddaughter. On July 1, 1971, the parents met with the grandparents' attorney. He discussed the matter with them. Thereafter, they and the attorney went to the

BLEED THROUGH POOR COPY

chambers of Judge William C. Calvin. Judge Calvin also briefly discussed the matter with the parents. The judge admonished them of the finality of their consent to adoption; thereafter, they executed the consent to adoption. On July 30, 1971, the adoption decree was entered. The parents continued to reside with grandparents and Nicole as if nothing had occurred that would have affected their parental relationship with their daughter. In late September of 1972, the parents were to move into a trailer they had purchased. When they attempted to take Nicole with them, grandparents refused to permit her to be taken from the residence.

On July 23, 1973, the parents filed a petition, supported by affidavits, requesting that the decree of adoption by set aside. The petition alleged that

representations made by respondent, Rose Hoffman, as to why the parents should execute a consent to the adoption of their daughter, Nicole, were false, and that these representations were relied upon by the parents. The petition further contended that the consent to adoption was obtained in violation of section 9.1-11 of the Adoption Act. (Ill. Rev. Stat. 1971, ch. 4, par. 9.1-11.)

On October 2, 1973, a hearing was held on the petition to vacate before Judge Joseph C. Munch. At the hearing, nine witnesses testified. The parents and grandparents testified on their own behalf and under section 60 of the Civil Practice Act. (Ill. Rev. Stat. 1971, ch. 110, par. 60.) The testimony was acrimonious and contradictory.

The parents contended that they sincerely loved their daughter; that

they were responsible and dutiful parents; and that they had eagerly accepted the burdens of parenthood. They contended that their love for their daughter and a deep desire to see that she was taken care of in the event of their untimely demise prompted them to give their consent to adoption. They related that they had, in good faith, trusted and relied upon the grandparents for guidance and counseling in this matter. Bernard admitted in his testimony that Judge Calvin had admonished him of the consequences of the consent to adoption. He stated he was aware that the consent was irrevocable. He explained that at the time of the adoption he was confident that his parents would never deprive him and Susan of the care and custody of their daughter. Bernard stated that he felt he could trust his parents that

BLEED THROUGH POOR COPY

they would never turn on him.

Susan testified that it was Mrs. Hoffman who initially raised the question of adoption, and in so doing stressed that if Bernard and Susan should be killed in an automobile accident, Nicole would be without a guardian, and that the proper way to see that Nicole was provided for was through adoption processes.

Both Susan and Bernard stated that Mrs. Robert Hoffman made arrangements for the adoption with her attorney, Thomas Lamkin; and that they met with Lamkin on one occasion, prior to the execution of their consent to adoption. Bernard and Susan stated that they had not consulted an attorney concerning the adoption, nor were they ever advised that they had a right to counsel relative to the matter.

POOR COPY

Mrs. Robert Hoffman stated that the parents took very little interest in the child and that she was required to look after and care for Nicole most of the time. She stated that her son failed as a father, in that he performed no fatherly functions and was gone almost every evening. Mrs. Hoffman stated that on many occasions Susan went with Bernard, thus leaving the infant in grandparents' home. Furthermore, both grandparents contended that the parents contributed very little for the support of Nicole, and that Bernard was not steadily employed when he resided with them. The grandparents urged that it was parents who initiated all conversations concerning the adoption, and that the parents were informed that if an adoption was effected, it would be final and that Nicole would not be traded back and

BLEED THROUGH POOR COPY

forth between the families.

Jesse Hammer, a friend of Bernard Hoffman, was called to testify by the parents. His testimony dealt with a conversation between Bernard Hoffman and Rose Hoffman that he had overheard one evening while in the grandparents' residence. Hammer said that Rose Hoffman told Bernard that he could have Nicole back when he settled down.

Mrs. Nicholas Hoffman, Bernard's paternal grandmother, testified on behalf of the parents. She related that she had a conversation with Rose Hoffman concerning the latter's attachment to Nicole. In the course of the conversation, Rose Hoffman allegedly stated that the parents would never get Nicole from her. On cross-examination, counsel for the grandparents attempted to discredit her testimony by establishing that she

BLEED THROUGH POOR COPY

disliked her daughter-in-law, Rose Hoffman.

The parents then called Alice Wiekle, the sister of Robert Hoffman, to testify. She related in her testimony that she had observed Susan and Rose Hoffman with Nicole on four or five occasions during a two-year period, and that on each occasion Mrs. Rose Hoffman clearly dominated when it came to the care and maintenance of Nicole. She stated that Susan was never given an opportunity to care for Nicole because of Mrs. Hoffman's domination.

The grandparents called attorney Thomas Lamkin to testify. He stated that he had admonished the parents concerning the finality of the adoption proceedings in question. Moreover, he related the sequence of events that occurred in Judge Calvin's office the

BLEED THROUGH POOR COPY

day that the parents executed the consent for adoption.

After arguments of counsel for the parents and grandparents and the guardian ad litem, the court took the matter under advisement. On October 11, 1973, the court denied the motion to vacate the decree of adoption in a one-sentence order and the parents appealed.

Under section 11 of the Adoption Act (Ill. Rev. Stat. 1971, ch. 4, par. 11), a properly executed and acknowledged consent to adoption is irrevocable unless procured by fraud or duress. The petition in question sought to have the consent to adoption executed by the parents set aside on the grounds it had been induced by fraud. Fraud generally includes anything calculated to deceive and is accompanied by a wrongful intent. (Exline v. Weldon, 57 Ill. 2d 105, 311

N.E. 2d 102.) The burden is on the party asserting the existence of fraud under a section 72 petition. (Lagen v. Lagen, 14 Ill. App. 3d 74, 302 N.E. 2d 201.) However, the purpose of section 72 proceeding is to bring before the court facts not appearing of record which, if known by the court at the time the final judgment was entered, would have prevented its rendition. Akers v. Christen, 11 Ill. App. 3d 369, 296 N.E. 2d 774.

The main thrust of the parents' argument is that because of the parental relationship that existed between themselves and the grandparents, the circumstances surrounding their marriage, and their relatively young ages, they were dependent upon them for guidance and advice. In short, the grandparents owed the parents a fiduciary duty which

precluded them from taking advantage of their vulnerable situation. We accept the parents' theory and find that such a fiduciary relationship did in fact exist. Also, the existence of this fiduciary relationship was underscored by the scope of the parents' dependency upon the grandparents, as illustrated by this record. As noted in Curtis v. Fisher, 406 Ill. 2d 102, 92 N.E. 2d 327, "The fiduciary relation is considered to exist and relief is granted where influence has been acquired and abused, and in those cases in which confidence has been reposed and betrayed." (Emphasis added.)

It is apparent from the record that this duty was breached by the grandparents in their efforts to secure custody of their grandchild through adoption channels. The record reveals a

BLEED THROUGH POOR COPY

bizarre set of circumstances that was spawned by the interplay of the personalities and relationship. All parties concerned contributed to the confusion and instability of the situation. However, the course of events was interfaced with the grandparents' unwillingness to exercise their own fiduciary obligations owed to the parents and their granddaughter. Grandparents compromised their responsibilities and chose to gain custody of their granddaughter through less than candid methods. Even if the grandparents sincerely believed the infant was neglected and the parents were unfit, their method of securing custody was inexcusable and unorthodox. If the grandparents were concerned with the best interest of their granddaughter, they could have resorted to the Juvenile

POOR COPY

Court Act (Ill. Rev. Stat. 1971, ch. 37, par. 1 et seq.) and obtained custody via the proceeding therein.

It is apparent from the record that originally the best interest of the infant was a secondary factor, and that all parties involved were more concerned with their own best interest. For example, the testimony of parents and their corroborating witnesses establishes that Mrs. Hoffman became inordinately attached to Nicole and functioned as a surrogate mother in all respects. The record also establishes that the parents were immature and neglected their parental duties. Their immaturity was manifested in their instability and inability to adjust to their new mode of life. Moreover, their lack of insight and experience was apparent from their testimony regarding the fact that they

felt the adoption was only a legal formality and that respondents would never turn on them. The grandparents, in violation of their fiduciary responsibility, exploited the parents' ignorance and used this ignorance to sever Nicole from them. The cumulative effect of the entire course of events and the manner that the grandparents capitalized thereupon amounted to fraud which was perpetrated upon the parents and the infant. The fact that the grandparents might not have initiated the talk concerning adoption, or that they may not have suggested adoption as a means of providing a guardian for Nicole in the event of parents' untimely demise, is of no consequence.

In so holding, we are mindful of the rationale underlying the public policy found in the Adoption Act which

BLEED THROUGH POOR COPY

makes a consent to an adoption irrevocable. (See: People v. Catholic Home Bureau, 34 Ill. 2d 84, 213 N.E. 2d 507.) Our opinion in no way undermines that policy since the element of fraud was present in this case, and the existence of fraud vitiates the voluntariness of the natural parents' consent to adoption. Moreover, the unique nature of the family relationship that existed between the natural parents, adoptive parents and the adopted child destroyed the elements of confidentiality that the declared public policy sought to preserve. Nicole would eventually be privy to the identity of her natural parents and all the facts involved in this litigation.

The trial court's judgment which denied the petition to vacate the adoption decree was against the manifest weight of the evidence. Such judgment

BLEED THROUGH POOR COPY

is reversed, and this cause is remanded with directions to grant the petition to vacate the decree.

REVERSED AND REMANDED
WITH DIRECTIONS

TRAPP, P.J., and SMITH, J., concur.

OPINION

SUPREME COURT
OF ILLINOIS

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
.) SS.
SUPREME COURT)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September, in the year of our Lord, one thousand nine hundred and seventy-five, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD,
Chief Justice

Justice Walter V. Schafer
Justice Daniel P. Ward
Justice Joseph H. Goldenhersh
Justice Thomas E. Kluczynski
Justice Charles H. Davis
Justice Howard C. Ryan

William J. Scott, Attorney General
William G. Lyons, Marshal

Attest: Clell L. Woods, Clerk

POOR COPY

BE IT REMEMBERED, that afterwards, to-wit, on the 26th day of September, 1975, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Docket No. 47321--Agenda 33--May, 1975.
In re ADOPTION OF NICOLE LEIGH HOFFMAN, a minor.--(Rose Allen Hoffman et al., Appellants, v. Bernard Allen Hoffman, et al., Appellees.)

MR. CHIEF JUSTICE UNDERWOOD delivered the opinion of the court:

This is a proceeding under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1971, ch. 110, par. 72) brought by the natural parents of a minor child to vacate a decree of adoption entered in the circuit court of DeWitt County in favor of the adopted child's paternal grandparents. The petitioners alleged that consents to the adoption of their daughter had been obtained from them on the basis of fraudulent misrepresentations made by the grandparents. The trial court denied the petition on the grounds that the natural parents had failed to sustain their burden of proof; on appeal, the Appellate Court for the Fourth Judicial District reversed and remanded with directions to grant the petition to vacate the decree (Hoffman v. Hoffman (1974), 24 Ill. App. 3d 543), and we allowed leave to appeal.

The natural parents, Bernard and Susan Hoffman, were married on December 5, 1969, at which time Bernard was 19 and serving in the United States Navy while Susan was 16 and attending high school. Their daughter, Nicole Leigh, was born on June 13, 1970. Shortly thereafter, Susan moved with the infant

POOR COPY

from the home of her parents to the home of the paternal grandparents, Robert and Rose Hoffman. Bernard joined his wife and daughter in his parents' home in September of 1970 after his honorable discharge from the Navy.

During the ensuing months, Bernard had a succession of jobs and was unable to maintain steady employment. He regularly remained out very late at night with friends and took Susan with him several nights a week. Susan was also away during the day attending school. As a consequence, the child was often left with the grandparents, who assumed what appears to have been an increasingly major role in the care and support of the child. Bernard and Susan experienced marital discord during this period, and a divorce was contemplated by Bernard.

The matter of adoption of the child by the grandparents was discussed by the natural parents and the grandparents on various occasions commencing in February, 1971, according to Rose Hoffman and in May or June, 1971, according to Bernard and Susan. The nature of these discussions and the circumstances under which they took place is disputed as will be related later. The end result, however, was a decision by both the natural parents and the grandparents to go forward with the adoption.

On July 1, 1971, Bernard and Susan went to the offices of an attorney who had been retained by the grandparents to handle the adoption proceeding. The

POOR COPY

BLEED THROUGH

attorney discussed with them the consequences of their consenting to the adoption of the child by the grandparents and informed them that they would be giving up all legal rights to the child. They then proceeded with the attorney to the chambers of Judge William C. Calvin, who also explained to them in detail the legal consequences of signing consents to adoption. It is conceded that the judge told them that irrespective of whatever arrangements they thought they had with Robert and Rose Hoffman concerning their future relationship with the child, any consents to adoption they signed would be irrevocable, and the consequences would be their absolute relinquishment of all parental and legal rights to the child. Bernard and Susan then signed the consents before Judge Calvin, who executed his certification that each of them acknowledged the consents to be free and voluntary acts; that he had explained that by signing such consents they had irrevocably relinquished all parental rights to the child; and that they had stated that such was their intention and desire. At the time the consents were signed, Bernard was 20 years of age and Susan was 17. On July 30, 1971, a decree of adoption was entered following a hearing at which the minor child was represented by a guardian ad litem.

After the entry of the adoption decree, Bernard and Susan continued to reside with Bernard's parents as if nothing had occurred affecting their parental relationship with the child. Late in September, 1972, they purchased

BLEED THROUGH

POOR COPY

a trailer, and when they attempted to take Nicole with them the grandparents refused to permit her to be removed from their residence.

On July 23, 1973, Bernard and Susan filed their section 72 petition requesting that the decree of adoption entered approximately 2 years earlier be vacated. The petition included allegations that when they signed the consents to adoption they had relied on the false representations of Rose Hoffman that the child would not be removed from their custody and that the purpose of the adoption was to provide for custody of the minor if they were both killed in an automobile collision; that as to Bernard it had also been represented to him by his mother that an additional purpose of the adoption was to terminate the parental rights of Susan Hoffman and vest them in the grandparents in the event Bernard and Susan should subsequently become divorced; and that the consents were obtained in violation of section 11 of the Adoption Act (Ill. Rev. Stat. 1971, ch. 4, par. 9.1-11). In an amended petition it was additionally alleged that the consents to adoption were obtained without due process of law in that the natural parents were not afforded legal representation either prior to or on the date they executed the consents to adoption.

At the time of the hearing on the section 72 petition on October 2, 1973, the child had remained in continuous residence with the grandparents for a period of over 3 years since shortly

POOR COPY

BLEED THROUGH

after birth. At the hearing, the natural parents attempted to show that they were responsible, dutiful parents who loved their daughter and were deeply concerned about what would happen to her in the event of their untimely demise in an automobile accident; that they placed great trust and confidence in Robert and Rose Hoffman and followed their advice that it was the best thing to do to permit them to adopt the child; that they believed adoption was the only means of providing for the child in the event of their death; and that notwithstanding the admonitions by Judge Calvin to the contrary they were confident that Bernard's parents would never deprive them of the care and custody of their daughter following the adoption.

The evidence on behalf of the grandparents indicated that Bernard and Susan took little interest in the child and were away much of the time leaving the child in their care; that the natural parents had failed in the performance of their responsibilities as parents and contributed very little to the support of the child; that they had agreed to adopt the child at the request of the natural parents; that they never indicated to Bernard and Susan in any manner that they could have custody of the child following the adoption; and that they had very little rapport with their son, who would not listen to them or take their advice.

There was a decided conflict in the testimony as to who first brought up the subject of adoption and what was said.

POOR COPY

BLEED THROUGH

According to the natural parents, Rose Hoffman initiated the subject on numerous occasions and persistently urged her son and daughter-in-law to permit them to adopt the child so that she would be properly cared for in the event Bernard and Susan were killed in an automobile accident. They both stated that they inquired as to whether there was any other way to provide for the child in the event of such a contingency, but that after checking into the matter Rose Hoffman told them there was no alternative. They stated that if they had known there was another method they never would have consented to the adoption. Bernard also testified that his mother suggested the adoption for the additional reason that if he and Susan should be divorced their daughter would remain on the Hoffman side of the family. They each testified that while they at first did not want to give up their child they finally changed their mind when Bernard's mother said that if they really loved the child they would set aside their personal feelings and go ahead with the adoption, which would be best for the child. On cross-examination each of them conceded that they knew Bernard's parents would care for the child if something happened to them no matter what course of action they decided to follow. Bernard also admitted that his father was against the adoption and wanted him to keep the child during the early stages of their discussion of the matter.

There was no testimony by Bernard that his parents had ever told him specifically that he and Susan could

POOR COPY

retain custody of the child after the adoption. Susan, however, indicated in her testimony that it was her understanding that Bernard had been told by his mother that even though they would be giving up legal custody, they would still retain physical custody and everything would stay the same as before the adoption. There was some indication that the purpose of the adoption may have been mentioned by the natural parents in Judge Calvin's chambers. Bernard testified that the judge had said the purpose of the adoption was beside the point and that "your parents could turn around and stab you in the back if they wanted to." It seems clear that both Bernard and Susan understood that, legally, the grandparents could do whatever they wished with the child following the adoption.

Robert and Rose Hoffman each testified that Bernard and Susan asked them to adopt their child and were the ones who at various times initiated discussions about the proposed adoption. Each time the matter was brought up, Robert Hoffman expressed hesitation about the proposal and indicated that they would have to wait and see. He also inquired of them whether they were sure they wanted to proceed in this manner, to which Bernard and Susan replied affirmatively on each occasion. The grandparents testified further that they never suggested in any manner that Bernard and Susan could retain physical custody of the child after the adoption and that they never said that an adoption was desirable to provide for the child in the event

BLEED THROUGH POOR COPY

Bernard and Susan should be killed in an automobile accident. Rose Hoffman testified that the only time there was any discussion about an accident was when Susan expressed concern over what people would think about her giving up her child for adoption and requested that the grandparents, if anyone should ask them about it, say as an excuse that it was to provide for the child in case of an accident.

The attorney who represented Robert and Rose Hoffman in the adoption proceedings testified that he explained to Bernard and Susan that if they signed the consents the adoption would be absolute and final. He also referred to the admonishments given by Judge Calvin as being very thorough and recalled that the judge had explained to them that the grandparents would become the legal parents of the child even if they continued to live in the family home. It was his general opinion from conversations with both the grandparents and natural parents that the purpose of the adoption was the natural parents' desire to be relieved of responsibility for the child.

Jesse Hammer, a friend of Bernard's, testified that on one occasion he was present at a family gathering in the Hoffman residence and overheard Rose Hoffman tell Bernard and Susan that they could have the child back when they settled down. As previously indicated, Rose Hoffman denied making any such statement at any time. Mrs. Nick Hoffman, who was Bernard's paternal grandmother,

POOR COPY

testified that on one occasion when she told Rose Hoffman that she was getting too attached to the baby and that it would be hard to give her up, Rose Hoffman replied that Bernard and Susan would never get the baby back. It was brought out on cross-examination that the witness disliked her daughter-in-law, Rose Hoffman, and was very close to her grandson, Bernard.

A sister of Robert Hoffman indicated that she had observed Susan and Rose Hoffman with the baby on several occasions over a 2-year period which led her to conclude that Rose Hoffman was taking too great an interest in the baby. She also testified that when she asked Susan if she wouldn't like to do more to help take care of the baby, Susan replied that she did not have much of a chance.

There was testimony that while Susan took care of the child on some occasions when she was home, the grandparents, and particularly Rose Hoffman, performed most of those duties. Susan acknowledged that she was permitted to take care of her child all she wished to and did in fact perform some parental duties every day. However, Rose Hoffman's testimony that she fixed all the meals and fed, bathed, did the laundry for the child and put her to bed at night most of the time is largely uncontradicted.

The grandparents testified that their son and daughter-in-law contributed a total of only $80 to the support of Nicole during the period of over 2 years they lived in the Hoffman residence.

BLEED THROUGH POOR COPY

Bernard stated to the contrary that he and his wife each contributed $7.50 per week to the support of the child and that during those periods when he was not working he would borrow funds for this purpose from his parents. Robert Hoffman testified he had never heard about any payments by his son and daughter-in-law of $7.50 per week for support and that he gave his son spending money of at least $5 to $10 each week which he did not keep a record of. There is also evidence that Bernard had borrowed funds for unspecified purposes from his parents. Rose Hoffman testified that she had purchased almost all of the child's clothing.

Robert Hoffman related that he had trouble communicating with Bernard, who would not listen to him, and that on one occasion his son had refused to work for him. Rose Hoffman testified as to her feeling of indifference toward her daughter-in-law.

The trial court denied the petition to vacate the decree of adoption for the reason that the petitioners had failed to sustain their burden of proof. The appellate court reversed upon a finding that the grandparents owed the natural parents a fiduciary duty which was breached in an effort to gain custody of the child through a course of conduct amounting to fraud. We disagree with the appellate court's conclusion that the trial court's finding to the contrary was against the manifest weight of the evidence.

Section 11 of the Adoption Act provides in pertinent part that "[a] consent to adoption by a parent, including a minor, executed and acknowledged in accordance with the provisions of Section 8 of this Act***shall be irrevocable unless it shall have been obtained by fraud or duress and a court of competent jurisdiction shall so find. The consent of a parent who is a minor shall not be voidable because of such minority." (Ill. Rev. Stat. 1971, ch. 4, par. 9.1--11.) This section clearly reflects a legislative recognition of the public policy favoring the finality and stability of adoptions. (People ex rel. Drury v. Catholic Home Bureau (1966), 34 Ill. 2d 84, 93-94.) The burden of proving fraud or duress rests upon the party challenging the validity of the consent, and the findings of a trial court as to this issue may not be set aside on appeal unless contrary to the manifest weight of the evidence. (Drury.) It is not contended that the consents were executed under duress, thus leaving as the sole issue the question whether the determination of the trial court that the natural parents had failed to sustain their burden of proof, which must include proof of fraud, is contrary to the manifest weight of the evidence.

As a general proposition, "Fraud includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence ***." (People ex rel. Chicago Bar

BLEED THROUGH POOR COPY

Association v. Gilmore (1931), 345 Ill. 28, 46.) "The concept of fraud 'implies a wrongful intent--an act calculated to deceive.'" (Exline v. Weldon (1974), 57 Ill. 2d 105, 110.) We have also observed that "A misrepresentation in order to constitute a fraud must consist of a statement of material fact, false and known to be so by the party making it, made to induce the other party to act, and, in acting, the other party must rely on the truth of the statement." Roth v. Roth (1970), 45 Ill. 2d 19, 23.

The natural parents' theory of fraud in this case is that the grandparents misrepresented the purpose and necessity for the adoption and led them to conclude that they could retain physical custody of the child notwithstanding the adoption. As indicated above, there was substantial conflict in the testimony concerning the nature and content of the discussions between the grandparents and the natural parents which preceded the signing of the consents to adoption. The matter of credibility of the witnesses was of major importance and is best determined by the trier of fact. Our review of the record leads us to conclude that this question could well have been resolved, as it apparently was, in favor of the grandparents. Considerable weight must be afforded not only to the uncontradicted testimony concerning the admonishments given by the attorney and Judge Calvin, but also to Judge Calvin's certification that after a full explanation the natural parents had acknowledged that it was their intention and desire to irrevocably

BLEED THROUGH POOR COPY

relinquish all parental rights to the child. It is particularly significant that Judge Calvin specifically warned the natural parents that they could not rely on any understandings they might have had with the grandparents as to their parental rights following the adoption. There is no indication that due to incompetency or any other cause the natural parents were unable to comprehend this admonition. To the contrary, the record indicates that they could and did understand the admonition but chose to ignore it. We therefore conclude that the finding of the trial court that petitioners failed to sustain their burden of proof is not against the manifest weight of the evidence, and the judgment of the appellate court to the contrary must be reversed.

This brings us to the contention urged by the natural parents that their signing of the consents to adoption without the advice of counsel constituted a violation of the equal protection and due process clauses of the United States and Illinois constitutions. They have cited no authorities which so hold, and we are not persuaded that there is merit to this contention. While it may be desirable for the natural parents of a child to have legal counsel prior to consenting to the adoption of the child, we do not find it to be constitutionally required, particularly in view of the safeguards contained in section 8 of the Adoption Act, which specifies the form of the consent (Ill. Rev. Stat. 1971, ch. 4, par. 9.1--8), and section 10(F), which requires all consents of this type

BLEED THROUGH POOR COPY

to be acknowledged by a parent before a judge or other person designated or approved by the court. Ill. Rev. Stat. 1971, ch. 4, par. 9.1--10(F).

Accordingly, the judgment of the appellate court is reversed and that of the trial court affirmed.

Appellate court reversed;
circuit court affirmed.

BLEED THROUGH

POOR COPY

UNITED STATES OF AMERICA

State of Illinois) ss
Supreme Court)

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the tenth day of November in the year of our Lord, one thousand nine hundred and seventy-five, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER

JUSTICE ROBERT C. UNDERWOOD

JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE HOWARD C. RYAN

JUSTICE CASWELL J. CREBS

WILLIAM J. SCOTT, ATTORNEY GENERAL

WILLIAM G. LYONS, MARSHALL

ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 21st day of November, A.D. 1975, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 1 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-1177

IN THE MATTER OF THE ADOPTION OF NICOLE LEIGH HOFFMAN, a Minor Female Child

BERNARD ALLEN HOFFMAN, SUSAN ANN HOFFMAN, and NICOLE LEIGH HOFFMAN, Petitioners,

vs.

ROSE ALLEN HOFFMAN and ROBERT NICHOLAS HOFFMAN, Respondents.

OPPOSITION BRIEF

Thomson, Thomson, Zanoni
& Flynn
105 N. Center Street
P.O. Box 3577
BLoomington, Illinois 61701
Phone: (309) 829-7069

Attorneys for Respondent

CHESTER THOMSON
MIKE MC ELVAIN

Of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-1177

In the Matter of the Adoption of Nicole Leigh Hoffman, a Minor Female Child

BERNARD ALLEN HOFFMAN, SUSAN ANN HOFFMAN, and NICOLE LEIGH HOFFMAN,
Petitioners,

vs.

ROSE ALLEN HOFFMAN and ROBERT NICHOLAS HOFFMAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

I N D E X

	Page
Table of Cases.	1
Authorities Cited	1
Statement of Facts	2
Argument	6
Conclusion	17
Appendix	19

TABLE OF CASES

Argersinger v. Hamlin, 407 U.S. 25, 925 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

Ryan v. Foreman, 262 Ill. 175, 104 N.E. 189 (1914).

AUTHORITIES CITED

Ill. Rev. Stat., ch. 4, §. 9.1-8 (1973).

Ill. Rev. Stat., ch. 4, §. 9.1-11 (1973).

Ill. Rev. Stat., ch. 3, §. 131 (1975).

STATEMENT OF FACTS

Respondents feel that the following facts taken from the opinion of the Supreme Court of the State of Illinois are necessary for this Court to consider for an accurate view of the case.

Bernard Hoffman, the natural father, was unable to hold steady employment after returning home from the U.S. Navy in September of 1970. He often stayed out late with friends. His wife, Susan Hoffman, was also away during the day attending school and the minor child was left for a great deal of time with the grandparents, the respondents in this case, Rose and Robert Hoffman.

The natural parents of the child contemplated divorce after experiencing a great amount of marital discord. The adoption was discussed in the family on various occa-

sions, but the initiator of the discussions and the content of such discussions is in dispute. At the end of these discussions in June of 1971 there was a decision by both the natural parents and the grandparents to go forward with the adoption. On July 1, 1971, the natural parents proceeded to the attorney of the adoptive parents and were informed that an adoption would require them to give up all legal rights to the child. After a conference with that attorney, the parties proceeded to the chambers of Judge William C. Calvin who explained to them in detail the legal consequences of signing consent adoptions.

The natural parents admit that the judge told them irrespective of whatever arrangements they thought they had with Robert and Rose Hoffman concerning their future relationship with

the child, that any consent would be irrevocable and the consequence would be their absolute relinquishment of all parental rights to the child. The natural parents then signed the consent before Judge Calvin, who acknowledged it and indicated the consents were free and voluntary acts. The Judge further indicated that he had explained that by their signing of the consents they had irrevocably relinquished their parental rights to the child and that they had stated such was their intent and desire.

Approximately two years after the granting of the adoption, the natural parents filed a petition requesting that the decree be vacated, alleging that there had been false representation and further alleging that the consents were obtained without due process.

In a hearing on October 2, 1973, the trial

court ruled that the natural parents failed to meet their burden of proof to overturn their consent and vacate the adoption.

At the present time, the child is approximately five years old and has lived with the respondents her entire life.

ARGUMENT

A. ADOPTION IS A STATUTORILY STATE CREATED RIGHT PREVIOUSLY UNKNOWN IN COMMON LAW.

The adoption of a child by a person not its parent is a right that was previously unknown at common law. Ryan v. Foreman, 262 Ill. 175, 104 N.E. 189 (1914). The State of Illinois has created such a right by legislation. Ill. Rev. Stat. ch. 4, §. 1, et al. The respondents contend that the Illinois Adoption Statute contains sufficient safeguards to satisfy the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States.

Illinois provides for two methods of termination of parental rights: by a judicial finding of the unfitness of the natural parent, or by consent of the natural parent. Ill. Rev. Stat., ch. 4, §. 9.1-8.

The trial court found and the Illinois Supreme Court confirmed that the petitioners' consents were freely and voluntarily given, and that they were not induced by fraud or duress. The consent was given in a non-adversary circumstance, unlike the termination of parental rights by a finding of unfitness in a contested judicial proceeding.

If the petitioners freely and voluntarily entered into a consent for adoption, were in agreement with the termination of their rights as natural parents, and were aware of the finality and consequences of their actions, where can there by any violation of due process of law? It is important to note that due process of law is essential when a person is being deprived of his life, liberty or property. But in the signing of an adoption consent, when done freely and volun-

tarily, it cannot be said to deprive the parents of anything, they are the ones giving. Any right they lost was not through the force of law but through a voluntary and freely given consent on their part.

Petitioners contend that counsel appointed to represent their interests exclusively would have avoided this situation, but such a contention is pure speculation. The laws of Illinois provide remedies for natural parents who are fraudulently induced to sign a consent of adoption, or whose consent was induced by fraud or duress. Ill. Rev. Stat., ch. 4, §. 9.1-11. Thus, consents which appear on their face to be voluntarily and freely given but were induced by duress or fraud may be revoked.

Petitioners ask this Court to amend the Illinois statute to allow a revocation of the natural

parents consents for the new element of failing to formally appoint an attorney. This clearly would usurp the authority of the Illinois Legislature.

Illinois law has guarded the right of the natural parents in duress or fraud situations to withdraw their consent.

Illinois law has also jealously guarded the important public policy of granting finality to adoptions, and has refused to allow the mere change of mind on the part of the natural parents to void free and voluntary consents. Ill. Rev. Stat., ch. 4, §. 9.1-11.

Petitioners cite Stanley vs. Illinois, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S.Ct. 1208 (1972) as this Court's recognition that equal protection must be granted to all members of the family unit to preserve it and the integrity of the right to

conceive and raise a family. The respondent has no argument with that right, and suggest that the Illinois Adoption Statute with its safeguards for the taking of consents does properly protect the right to conceive a family and the integrity of that unity. This Court noted in Stanley:

> In considering this procedure under the due process clause, we recognize, as we have in other cases, that the due process of law does not require a hearing "in every conceivable case of government impairment of private interest".

504 U.S. 649, 650. The respondents respectfully suggest to this Court that this is such a case, and that the due process clause of the United States Constitution does not require an appointment of counsel for natural parents to voluntarily sign a consent for adoption of their child. To do so would turn a consentual proceeding into that of an adversary situation. Ample opportunity

existed for the petitioners to obtain competent legal advice.

B. APPOINTMENT OF COUNSEL IS NOT CONSTITUTIONALLY MANDATED IN CIVIL CASES.

Petitioners admit that Powell v. Alabama, 278 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932), and Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) are not direct authority for the proposition that counsel must be appointed in all civil cases. No such case exists. They argue by analogy that those cases justify such a result. We recognize that the Due Process Clause does not differentiate between deprivation of life, liberty or property. But to hold that from such a clause there evolves a mandatory appointment of counsel in every civil proceeding ignores the distinctions that exist be-

tween a consentual adoption and a criminal trial.

A criminal charge by definition is an adversary proceeding. Quite to the contrary, the consent in an adoption is a voluntary act that initiates a proceeding and is not a response to charges that have been brought against the natural parents. An adoption occurring by consent is in fact an action between two private parties requesting the State to give the effect of law to their private decisions.

C. WHETHER MINOR NATURAL PARENTS REQUIRED APPOINTMENT OF ATTORNEY OR GUARDIAN AD LITEM IS A MATTER OF STATE INTEREST.

Respondent recognizes that in various elements of contract law, privileges are granted to minors to void contracts. But we deny that such a right results from the Due Process Clause of the

United States Constitution but rather it existed in common law and is a subject of exclusive state control. States have reserved the authority to determine when minority gives way to majority and the State of Illinois has exercised that power. By statute, all persons below 18 years of age are considered to be minors for certain provisions of contract law. Ill. Rev. Stat., ch. 3, §. 131. The Illinois legislature has recognized that a minor parent is emancipated. The consent of a parent who is a minor is not voidable because of such minority. Ill. Rev. Stat. ch. 4, §. 9.1-11 (1971). The petitioners recognize the validity of this statue. They realize that there is authority for the State of Illinois to determine that siring or bearing of a child emancipates the minor parent and allows them to decide upon rearing the child or adopting it. If the court can allow a

16 year old minor to marry, it can also allow a minor parent to consent to an adoption without the appointment of a guardian ad litem. In so recognizing this point, the counsel for the petitioners surely must waive any argument that a guardian ad litem is necessary for a minor parent to sign a consent for an adoption.

D. THE FACTS OF THE INSTANT CASE SHOW THAT DUE PROCESS WAS NOT VIOLATED.

The facts of this case show that adequate legal advice was provided. If counsel for petitioner desires their theory to become the rule of law for this nation, they have chosen a poor vehicle to request this Court to make such a pronouncement. Petitioners admit the attorney of the adopting parents advised them of the finality of an adoption and that it must be a voluntary act

on their part.

After the conversation with that attorney, the natural parents, the adoptive parents and the attorney himself proceeded to the chambers of the Circuit Judge in DeWitt County where it is again unanimously admitted that the Circuit Judge described the effect of signing the consent in detail to the natural parents. The judge, after determining for his own satisfaction that the natural parents were fully advised as to the consequences and finality of their action, then allowed them to execute the consent in front of him. This was done in a hearing separate and apart from the adoptive proceeding. The respondent contends that the natural parents were under illusion that this was the proper manner of estate planning. The trial court concluded this was a sham and was made up to keep the natural parents

from the embarassing questions surrounding their consent to the adoption of their child.

The trial court concluded that there was no duress upon the natural parents and they had not been fraudulently led to believe that an adoption consent was the only method of estate planning to care for their child in the event of a mutual accident. The lower court determined that the natural parents freely and voluntarily gave their consent. Surely it cannot be contended that due process was violated as the legal consequences of the action of the natural parents was fully explained to them by an attorney and a judge.

CONCLUSION

The respondents respectfully suggest to this Court that adoption is a creation of state statute that was previously unknown at common law and exists in Illinois solely by virtue of the statute creating such a right. In this instance permission for the adoption was granted by the natural parents to which the sanction of state law was applied by a judicial proceeding. The respondent further suggests that it is a matter of state decision as to when attorneys are required for the representation of minors and that due process was granted to the natural parents in this circumstance by the advice of the attorney and circuit judge. What could a guardian ad litem provide in addition

BLEED THROUGH

to what is present in this case?

Respectfully submitted,

ROSE ALLEN HOFFMAN and ROBERT NICHOLAS HOFFMAN, Respondents, by their attorneys, Thomson, Thomson, Zanoni & Flynn

Chester Thomson

Chester Thomson, Of Counsel

Mike McElvain

Mike McElvain, Of Counsel

EED THROUGH

APPENDIX

Ill. Rev. Stat., ch. 4, §. 9.1-8 (1973)

Consents to Adoption . Except as hereinafter provided in this Section, consents shall be required in all cases, unless the person whose consent would otherwise be required shall be found by the court to be an unfit person as defined in Section 1 of this Act, or the parent of an adult sought to be adopted.

Ill. Rev. Stat., ch. 4, §. 9.1-11 (1973)

Consents, irrevocability. A consent to an adoption by a parent, including a minor, executed and acknowledged in accordance with the provisions of Section 8 of this Act, or a surrender of a child by a parent, including a minor, to an agency for the purpose of adoption shall be irrevocable unless it shall have been obtained by fraud or duress on the part of the person before whom such consent, surrender, or other document equivalent to a surrender is acknowledged pursuant to the provisions of Section 10 of this Act or on the part of the adopting parents or their agents and a court of competent jurisdiction shall so find. The consent or surrender of a parent who is a minor shall not be voidable because of such minority.

Ill. Rev. Stat., ch 3, §. 131 (1975)

Minors, Who are. persons of the age of

LEED THROUGH

18 shall be considered of legal age for all purposes, except that of the Illinois Uniform Gifts to Minors Act, and until this age is attained, they shall be considered minors.

BLEED THROUGH